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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE,)	Cause No. DDV-2012-356
Limited Partnership,)	
)	Judge: James P. Reynolds
Petitioner,)	
)	FT. HARRISON'S SUPPLEMENTAL
vs.)	PETITION AND DEMAND FOR JURY
)	TRIAL
MONTANA BOARD OF HOUSING,)	
)	
Respondent,)	
)	
CENTER STREET LP, SWEET GRASS)	
APARTMENTS LP, SOROPTIMIST)	
VILLAGE LP, FARMHOUSE PARTNERS-)	
HAGGERTY LP AND PARKVIEW)	
VILLAGE LLP,)	
)	
Intervenors.)	

Petitioner Ft. Harrison Veterans Residence, Limited Partnership ("Ft. Harrison"), pursuant to Mont.R.Civ.P. 15(d), hereby files this supplemental petition, seeking judicial review of decisions of the Montana Board of Housing (the "Board"), a declaratory judgment against the 2012 Qualified Allocation Plan ("QAP"), the 2013 Qualified Allocation Plan ("QAP"), and ARM 8.111.602 and 8.111.603. In support of its petition, Ft. Harrison states and alleges as follows:

1. Jurisdiction and venue are proper in this Court pursuant to §§ 2-4-506, 2-4-702 and 25-2-123, MCA.

2. The Board is a quasi-judicial executive branch board of the State of Montana which is assigned to the Department of Commerce for administrative purposes only. Low income housing tax credits (“LIHTC”) are governed by 26 U.S.C. § 42. The Board administers and allocates LIHTCs annually within Montana. The Board maintains its principal office in Helena, Montana.

3. Ft. Harrison is a Florida limited partnership created for the purpose of developing a housing project to serve low income, homeless and/or disabled veterans and their families in historical buildings located on Fort Harrison, outside Helena, Lewis and Clark County, Montana (the “Freedoms Path Project”). Without an award of LIHTCs, the Freedoms Path Project is not viable.

4. The land Ft. Harrison intends to use for the Freedoms Path Project is currently owned by the Federal Government. Ft. Harrison’s right to use the land is conditioned on whether the Federal Government considers the Freedoms Path Project is viable. If the Federal Government determines the Freedoms Path Project is not viable, it may terminate Ft. Harrison’s right to use the land at any time.

5. For 2012, Montana was allocated approximately \$2.5 million in LIHTCs, which are intended to provide an incentive for developers to develop low income housing by providing LIHTCs, which can be used as a source of funding for qualifying projects.

6. The Board completed the process by which it awarded Montana’s LIHTCs for 2012. Ft. Harrison applied for LIHTCs, but did not receive an allocation from the Board.

LIHTC Application and Allocation Process

7. 26 USC § 42 governs the Board's award of LIHTCs for projects in Montana.
8. The Board is required to allocate credits in accordance with a properly developed and adopted QAP. The QAP must satisfy the requirements of 26 USC § 42, as well as the Montana Administrative Procedure Act. §§ 2-4-101, et seq., MCA.
9. The Board reviewed and distributed the 2012 QAP for public comment on August 23, 2011. The Board accepted public comment and approved the 2012 QAP on October 17, 2011. The Governor approved the 2012 QAP on November 2, 2011. The 2012 QAP sets the selection criteria and scoring weights the Board must apply to Montana LIHTC applications for 2012.
10. The 2012 QAP included a scoring preference for Montana based applicants and consultants in violation of the interstate commerce clause of the U.S. constitution.
11. On January 2, 2012, the Board filed MAR Notice 8-111-100, proposing to modify ARM 8.111.602 and 603 to correctly incorporate the 2012 QAP by reference.
12. On January 20, 2012, Ft. Harrison submitted its application for Montana LIHTCs. A total of 15 applicants submitted applications within the time allowed.
13. The Board held a hearing on February 13, 2012, to hear presentations from all applicants.
14. After the February hearing, the Board's staff scored the applications as required by the 2012 QAP.
15. The staff incorrectly reduced the scoring for the Freedoms Path Project to 100 points out of a total of 108. If properly scored, the Freedoms Path Project would have scored either 106 or 107.

16. On April 5 2012, Ft. Harrison sent a letter to the Board's staff requesting a correction to its scoring. The Board's staff did not respond in writing, and verbally refused to correct Ft. Harrison's score. The staff indicated that the scoring was intended only to establish whether a particular project met a threshold score for consideration by the Board. According to the 2012 QAP and staff, the Board retains discretion to allocate LIHTCs to applicants regardless of score.

17. The Board met on April 9, 2012, to award the LIHTCs for 2012. The Board refused to review the staff's scoring of the Freedom's Path Project, and failed to pass a motion to allocate LIHTCs to the Freedoms Path Project.

18. The top scorer received a score of 106 and was awarded its full requested LIHTCs for 2012. The other successful applicants had scores of 105.

19. The Board violated Ft. Harrison's substantial rights by refusing to correct the erroneous scoring, and by asserting the scoring is irrelevant because the Board retains absolute discretion to award LIHTCs to projects regardless of score or objective criteria.

20. The Board's allocation of LIHTCs is arbitrary and capricious and an unwarranted exercise of discretion in that it does not conform to objective standards and is not supported by reasonable evidence or explanation.

21. The Board's allocation of LIHTCs also violates both federal and state law in that it fails to abide by the objective criteria established in the 2012 QAP, and improperly reserves discretion to ignore the objective criteria without explanation.

22. The Board's April 9, 2012, decision failed to comply with procedural requirements of MAPA because it was not in writing, and did not contain sufficient findings or

conclusions by which a reviewing court or members of the public could review the Board's decision.

23. Ft. Harrison sought reconsideration of the Board's April 9, 2012, allocation decision by letter dated April 23, 2012.

24. At its regularly scheduled meeting on May 3, 2012, the Board declined to reconsider its allocation decision.

25. Acts of administrative agencies, including the Board, are governed by MAPA.

26. MAPA provides that agency actions fall into one of two categories: 1) rulemaking and 2) contested cases. According to ARM 1.3.211, a "rule is an agency statement of general applicability that interprets law or describes agency requirements. It applies to all persons who are subject to the requirements or regulations of the agency and comes within the terms of the rule. A contested case involves an agency determination that affects the rights or responsibilities of a specifically named party."

27. The Board's allocation of LIHTCs for 2012 did not comply with the MAPA requirements for either a rule or a contested case.

Adoption of the 2013 QAP

28. The Board began preparing the 2013 QAP in 2012. At its August 16, 2012, meeting, the Board approved public notice and distribution of the 2013 QAP.

29. At its October 15, 2012, meeting, the Board accepted public comments on the 2013 QAP. A representative of Ft. Harrison voiced numerous concerns with the 2013 QAP.

30. Despite these comments, the Board approved the 2013 QAP for submission to and approval by the Montana Governor. The Governor approved the 2013 QAP on October 26, 2012.

31. On October 30, 2012, the Board filed MAR Notice 8-111-106, proposing the amendment of administrative rules 8.111.602 and 8.111.603 to formally incorporate the 2013 QAP for use in the 2013 LIHTC allocation process.

32. Ft. Harrison, through its representative, objected to the proposed rule. In response, the Board disagreed with Ft. Harrison's objections and adopted the 2013 QAP and administrative rules as proposed.

33. As adopted, the 2013 QAP includes a scoring preference for Montana based applicants and consultants in violation of the interstate commerce clause of the U.S. Constitution.

34. Upon information and belief, this scoring preference has also contributed to a disparate impact against out-of-state applicants, such as Ft. Harrison, which has resulted in the award of almost all past LIHTC allocations to in-state applicants.

35. The Board has also operated with a preference for in-state applicants, and since Ft. Harrison challenged the Board's 2012 decision, it has operated with hostility towards Ft. Harrison, specifically.

36. Other evaluation criteria in the 2013 QAP are unconstitutionally vague. These provisions require an applicant of common intelligence to guess at what criteria will be used to evaluate its application.

37. Because of these vague provisions, Ft. Harrison is unable to reasonably determine whether it can properly apply for LIHTCs during the 2013 allocation process or what attributes its project and application must possess to qualify for consideration and allocation of LIHTCs.

38. The 2013 QAP also includes a Corrective Award that makes available LIHTCs required by court order, based upon a legal challenge to a prior award determination.

39. These LIHTCs are awarded first from unreserved or returned 2012 LIHTCs, and then from 2013 LIHTCs. However, all of the 2012 LIHTCs have been reserved, and as of the filing of this petition, Ft. Harrison is unaware of any 2012 LIHTCs that have been returned. This leaves only the 2013 LIHTCs for distribution under the Corrective Action provision of the 2013 QAP if the Court finds in favor of Ft. Harrison.

COUNT I- JUDICIAL REVIEW

40. The Board's allocation of LIHTCs is a contested case governed by MAPA because it was an administrative decision required to be made after a hearing in which the legal rights, duties and privileges of specifically named applicants are determined.

41. Ft. Harrison is entitled to judicial review of the Board's allocation under § 2-4-702, MCA.

42. The Court must reverse the Board's refusal to correct the scoring for the Freedoms Path Project, as well as the 2012 LIHTC allocation. The Court must remand the matter with instructions to the Board to correct the scoring and to award LIHTCs in accordance with the corrected scoring.

COUNT II – MAPA DECLARATORY JUDGMENT

43. Alternatively, Ft. Harrison seeks a declaration pursuant to § 2-4-506, MCA, that the Board's allocation for 2012 was invalid because it failed to comply with the substantive or procedural requirements for rulemaking under MAPA.

COUNT III – DECLARATORY JUDGMENT

44. Alternatively, Ft. Harrison seeks a declaration pursuant the Uniform Declaratory Judgment Act that the 2012 QAP did not comply with state or federal law governing the awarding of LIHTCs by a Montana administrative agency, reversing the Board's April 9, 2012,

allocation and ordering the Board to apply the 2012 QAP criteria objectively, correct the scoring for the Freedoms Path Project, and awarding LIHTCs according to the corrected scores.

COUNT IV – DECLARATORY JUDGMENT

45. Ft. Harrison seeks a declaration pursuant to § 2-4-506, and alternatively the Uniform Declaratory Judgment Act, declaring invalid the 2013 QAP because it contains unconstitutional provisions, and declaring invalid ARM 8.111.602 and 8.111.603, which formally incorporate the 2013 QAP.

COUNT V – STAY/INJUNCTIVE RELIEF

46. The Freedoms Path Project is time sensitive because its economic viability depends on cooperation from the federal Veterans Administration, availability of historical preservation credits, the current nine percent calculation for LIHTCs, and an expected allocation of special project based assistance vouchers for qualifying veterans.

47. A delay until the 2013 LIHTC allocation process creates substantial risk that some or all of that supplemental funding will be unavailable.

48. Ft. Harrison is entitled to a stay of the Board's allocation of LIHTCs pursuant to § 2-4-702(3), MCA, because the improper allocation of credits for 2012 creates the substantial likelihood the Freedoms Path Project will become economically non-viable due to changes in the calculations for future LIHTCs as well as loss of federal funding for other key sources of revenue and capital for the Freedoms Path Project.

49. Alternatively, Ft. Harrison is entitled to an injunction against the Board's allocation of LIHTCs to preserve the status quo during the pendency of this action and to preserve a sufficient portion of the 2012 LIHTC allocation to provide meaningful relief to Ft. Harrison if the Court finds in its favor.

50. Ft. Harrison is entitled to injunctive relief postponing the 2013 allocation process until the Court has issued a final decision in this matter.

51. Alternatively, if the Court finds the 2013 QAP and the administrative rules valid, Ft. Harrison is entitled to injunctive relief postponing the 2013 allocation process, until the Court has issued a final decision in this matter, to prevent the Board from allocating the 2013 LIHTCs. The 2013 LIHTCs must be preserved to provide meaningful relief to Ft. Harrison, or other applicants, if the Court finds in favor of Ft. Harrison.

WHEREFORE, Ft. Harrison requests the Court enter the following:

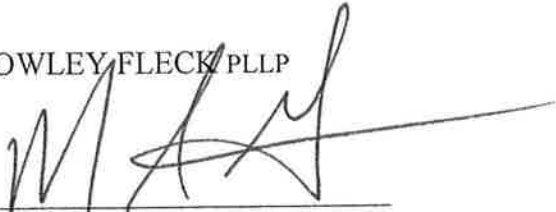
1. An order granting Ft. Harrison's request for judicial review and reversing the Board's denial of Ft. Harrison's application for LIHTCs;
2. An order declaring the Board's award of LIHTCs for 2012 invalid and illegal, and requiring allocation to the Freedoms Path Project;
3. An injunction or stay against the Board preventing it from allocating the 2012 LIHTCs during the pendency of this action;
4. An order declaring the 2013 QAP and ARM 8.111.602 and 8.111.603 invalid;
5. An injunction postponing the 2013 LIHTC allocation process until the Court issues a final ruling in this matter;
6. Attorneys fees and costs: and
7. All other just and equitable relief.

Jury Demand

Ft. Harrison hereby demands a jury trial on all issues so triable.

Dated this 8th of January, 2013.

CROWLEY FLECK PLLP


By 
Michael Green
Attorneys for Ft. Harrison Veterans Residence, L.P.

CERTIFICATE OF SERVICE

I, Michael Green, hereby certify that on the 8th day of January, 2013, I had mailed via U.S. Mail a true and correct copy of the foregoing to the following:

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